No. 82-945

IN THE

Supreme Court of the United States

October Term, 1983

SURE-TAN, INC. and SURAK LEATHER COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Motion for Leave to File Amici Curiae Brief and Amici Curiae Brief of Mexican American Legal Defense and Education Fund and National Immigration Project of the National Lawyers' Guild.

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Questions Presented.

1. Does an employer violate Section 8(a)(1) and (3) of the National Labor Relations Act where the employer knowingly employs undocumentated aliens but then reports them to the Immigration and Naturalization Service immediately after they vote to be represented by a union, which causes them to be arrested by the INS and to leave the United States?

2. Does the National Labor Relations Board have the power to tailor the conventional reinstatement and backpay remedy to the unique remedial problems raised by such a violation of the Act?

3. Should any offer of reinstatement conditioned on the employee's legal reentry to the United States remain open for at least four years to provide the employee a reasonable period to attempt to reenter legally and be written in both Spanish and English?

4. Should the Board have discretion to require the employer to pay a minimum amount of backpay even if the discriminatee does not gain legal reentry to the United States and cannot immediately accept an offer of reinstatement, if the Board concludes that such an award is necessary to effectuate the purposes of the Act?

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Motion of the Mexican American Legal Defense and Educational Fund and the National Immigration Project of the National Lawyers' Guild for Leave to File Amici Curiae Brief.

The Mexican American Legal Defense and Educational Fund, Inc. ("MALDEF") and the National Immigration Project of the National Lawyers' Guild respectfully move for leave to file a brief as *amici curiae* in support of respondent National Labor Relations Board. Respondent has consented to the filing of this brief; Petitioners refuse consent.

A. Interest of Amici Curiae.

MALDEF is a national civil rights organization established in 1968. Its principal objective is to secure the civil rights of Hispanics living in the United States, both documented and undocumented, through litigation and educa-

tion. MALDEF has always had an interest in assuring that the rights of Hispanics are protected in the workplace without regard to their legal status. In support of these goals, MALDEF has undertaken extensive litigation in the areas of immigrants' rights in regard to employment, Immigration and Naturalization Service procedures, and social welfare benefits. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982).

The National Immigration Project of the National Lawyers' Guild, Inc., is a non-profit organization of attorneys, law students, legal and community workers dedicated to protecting the rights of immigrants, both documented and undocumented, in the United States. It has a special interest in the outcome of this case, because of the unique problems facing undocumented workers. The National Immigration Project of the National Lawyers' Guild recognizes that without adequate remedies for labor law violations committed against these employees, employers will have an incentive to violate additional laws, knowing that this segment of the workforce is vulnerable to exploitation.

B. Summary of Argument.

Undocumented aliens are "employees" under the National Labor Relations Act. This Court should give substantial deference to the Board's interpretation of the term "employee" particularly where, as here, the Board's interpretation is consistent with the language of the Act and necessary to effectuate the policies of the Act. To exclude undocumented aliens from the Act would disrupt the union certification and collective bargaining process and would provide an incentive to employers to hire undocumented workers.

Sure-Tan committed an unfair labor practice by reporting its undocumented workers to the INS in retaliation for their support of a union. While it is certainly not an unfair labor practice for an employer to attempt to enforce the immigration laws in a non-discriminatory manner, it should be an unfair labor practice for an employer who knowingly

employs undocumented aliens to report them to the INS because they voted for a union. Sure-Tan's report to the INS is not immunized from liability under the First Amendment or the immigration laws. Sure-Tan was not suffering any injury at the hands of the undocumented aliens, and its report to the INS was not an effort to seek redress of grievances from the government.

The Board should have discretion to tailor the conventional remedies of reinstatement and backpay to the unique remedial problems posed by this case. An offer of reinstatement should be conditioned on the discriminatee gaining legal reentry to the United States, but the offer should be kept open at least 4 years in light of the substantial delays incurred by aliens seeking legal entry. In order to deter unfair labor practices, the employer should be liable for some amount of backpay even if the employees do not gain legal reentry and cannot immediately accept a reinstatement offer. Backpay should not be entirely tolled by the employees' absence from the United States since the employees did not voluntarily leave this country and did not wilfully incur any portion of their loss. A contrary rule would give employers free license to exploit undocumented aliens and to violate the Act.

Wherefore the Mexican American Legal Defense and Educational Fund, Inc. and the National Immigration Project of the National Lawyers' Guild respectfully requests that their motion to file an *amici curiae* brief be granted.

Respectfully submitted,

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Amici Curiae Brief of Mexican American Legal Defense and Educational Fund and National Immigration Project of the National Lawyers' Guild.

STATEMENT OF THE CASE.

Respondents ("Sure-Tan") are commonly-owned small leather processing firms located in Chicago. Sure-Tan was aware in 1976 that most of its approximately eleven employees were Mexican nationals who had not been legally admitted to the United States.[1]

A union organization drive began at Sure-Tan in July 1976, and on August 12, 1976, the Union filed an election

[1]Sure-Tan, Inc., 234 NLRB 1187, 1190 n.3 (1978) (finding of Administrative Law Judge). In fact, John Surak executed an affidavit on January 10, 1977, stating that several months before December 1976, he had been told by a "confidential source" that none of his employees possessed proper immigration papers. *Id.*

petition. Sure-Tan attempted to coerce the workers into voting against the Union by suggesting that there would be less work if the Union won[2] and by interrogating them about their union sympathies, followed by ethnic slurs.[3]

On December 10, 1976, Sure-Tan's employees voted six to one to designate the Union as their representative for collective bargaining.[4] Sure-Tan filed objections to the election alleging, *inter alia*, that six of the seven voters were aliens who had not been legally admitted to the United States.[5] On January 17, 1977, in a Supplemental Decision on Objections, the Board's Acting Regional Director overruled the objections and certified the Union.[6]

Sure-Tan received the Supplemental Decision on objections on January 19, 1977. The next day, Sure-Tan sent a letter to the Immigration and Naturalization Service ("INS") requesting it "to check the emigration [sic] status of several [of] our employees who are Mexican nationals."[7] The Board found that Sure-Tan's request to the INS was motivated by the employees' support of the Union.[8] (Sure-Tan also refused to negotiate with the Union, resulting in a Board complaint and eventual order to negotiate with the Union.)[9]

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[2]*Id.* at 1189-90.

[3]*NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 596 (7th Cir. 1982)

[4]*Sure-Tan, Inc.*, 231 NLRB 138 (1977).

[5]*Id.*

[6]*Sure-Tan, Inc.*, 231 NLRB 138, 139 (1977). Sure-Tan timely requested the Board to review the Acting Regional Director's decision. The Board, on February 17, 1977, denied the request as raising no substantial issues warranting a hearing. *Id.*

[7]*Sure-Tan, Inc.*, 234 NLRB 1187, 1189 (1978) (finding of Administrative Law Judge).

[8]*Id.* at 1191.

[9]*Sure-Tan, Inc.*, 231 NLRB 138 (1977). The Union filed a charge on March 1, 1977 alleging a refusal to negotiate with the Union. The Board issued a complaint on March 16, 1977. After the complaint was answered by Sure-Tan, the Board's General Counsel moved for summary judgment. The matter was transferred from the ALJ to the Board which granted the motion for summary judgment and ordered Sure-Tan to bargain with the Union. *Id.* The Board's Order was enforced by the United States Court of Appeals for the Seventh Circuit. *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (1978).

As a direct result of Sure-Tan's letter, INS agents visited Sure-Tan's premises on February 18, 1977.[10] The agents arrested five employees who, later that same day, executed INS Form I-274 by which they acknowledged that they were Mexican citizens not legally admitted to the United States. Each employee accepted voluntary departure from the United States as a substitute for deportation and was placed on board a bus bound for El Paso, Texas and the border.[11]

The Board issued complaints alleging that Sure-Tan constructively discharged the five employees because of their union activities.[12] An Administrative Law Judge, after a hearing, found that Sure-Tan's letter to the INS was motivated by the employees' support of the Union,[13] that the employees left the United States as a proximate result of Sure-Tan's action, and that Sure-Tan had therefore violated Section 8(a)(1) and (3) of the Act.[14]

The Administrative Law Judge recommended as a remedy that Sure-Tan send offers of reinstatement to the five discriminatees at their last known addresses in Mexico and that the offers of reinstatement be held open for six months to afford the discriminatees an "opportunity to return legally and accept reinstatement."[15] The Administrative Law Judge denied any backpay relief since the employees' being physically unavailable for employment after their return to Mexico, in his view, nullified any backpay liability under existing Board precedent.[16] He recommended, however, that the Board consider awarding at least four weeks' backpay.

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[10]*Sure-Tan, Inc.*, 234 NLRB 1187, 1189 (1978).

[11]*NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 599 (7th Cir. 1982).

[12]*Sure-Tan, Inc.*, 234 NLRB 1187, 1188 (1978).

[13]*Id.*

[14]*Id.* at 1191. The Administrative Law Judge emphasized that his finding "*does not* foreclose an employer from making a similar request [to the INS] where its request is not motivated by their employees' union activities or protected concerted activities." *Id.* at 1191, n.5.

[15]*Id.* at 1192-93.

[16]*Id.* at 1192-93.

As he noted, "without an award of some backpay, the violations herein will largely go unremedied and the Employer may be encouraged to adopt an apparently foolproof system of defeating union organizational attempts. Consequently, some backpay award can act as a deterrent to similar future violations."[17]

By Decision and Order dated March 6, 1978, the Board affirmed the Administrative Law Judge's findings but modified his proposed Order. The Board noted that there was no evidence in the record as to whether the five constructively-discharged employees had returned to the United States. The Board therefor ordered its conventional remedy of reinstatement with backpay, but pointed out that the appropriate forum for determining any issues relating to the employees' availability for work would be a compliance proceeding.[18]

The Board's General Counsel filed a motion for clarification, claiming that the Order would encourage discriminatees to return illegally to claim reinstatement, rather than wait to reenter the United States legally. The General Counsel requested that the Board require reinstatement only if the discriminatee reenters lawfully and that all backpay be denied unless the discriminatee is denied employment after his lawful return.[19]

The Board denied the General Counsel's motion.[20] The remedial policies of the Act, it held, would best be effectuated by affording unconditional reinstatement. The usual procedures applied by the Board for locating discriminatees should be followed. Discriminatees located but found to be unavailable for work, including unavailability due to absence from the United States, would have their backpay tolled accordingly. If there was a long delay in locating

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[17] *Id.* at 1193.
[18] *Id.* at 1187.
[19] *Sure-Tan, Inc.*, 246 NLRB 788 (1979).
[20] *Id.*

discriminatees, backpay would be placed in an escrow account for a two-year period.[21] The Board reiterated that the appropriate forum for implementing the Order was a compliance proceeding, which would provide "the factual determinations as to locations and availability."[22]

The Court of Appeals modified the Board's Order and enforced it as modified. *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592 (7th Cir. 1982). It held that the evidence supported the Board's finding that anti-union animus motivated Sure-Tan to write the INS. The Court noted that John Surak, a co-owner of the company, was well aware that his employees were undocumented aliens, yet he did nothing about it until after the Union won the election.[23] "A contrary holding," the Court reasoned, "would encourage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy."[24]

With respect to the reinstatement issue, the Court of Appeals held that the Board's Order should be modified to require reinstatement only if the discriminatees are legally present and free to be employed in this country when they offer themselves for reinstatement.[25] The Court reasoned that the reinstatement offer should be left open for four years to afford the discriminatees "liberal but reasonable" opportunity to obtain legal entry.[26] The Court of Appeals also held that the reinstatement offers should be written both in Spanish and English.

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[21]*Id.* citing NLRB Casehandling Manual (Part III) § 10644. The Casehandling Manual provides that any funds attributable to employees who cannot be located are refunded to the employer. *Id.* § 10584.2(c). *See also NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 606 n.19 (7th Cir. 1982).

[22]*Sure-Tan, Inc.*, 246 NLRB 788, n.6 (1979).

[23]*NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 600 (7th cir. 1982).

[24]*Id.* at 601.

[25]*Id.* at 606.

[26]*Id.*

With respect to backpay, the Court of Appeals agreed with the Board that in computing backpay, discriminatees will generally be considered unavailable for work (and backpay liability tolled) during any period when the discriminatee was not lawfully present in the United States.[27] The Court held, however, that it would better effectuate the purposes of the Act to set a minimum amount of backpay which the employer must pay in any event and found that six-months' backpay appeared to be reasonable. The Court of Appeals therefore enforced the Board's Order as modified, [28] but gave the Board leave "if it sees fit" to modify the Order further by setting a minimum period of six months' backpay.[29] In its judgment and order of July 12, 1982, however, the Court of Appeals required that each discriminatee be awarded a minimum of six months' backpay.

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[27] *Id.*

[28] The Court of Appeals reduced the escrow period from two years to one year.

[29] *Id.* at 606.

ARGUMENT.

I.

UNDOCUMENTED ALIENS ARE "EMPLOYEES" WITHIN THE MEANING OF THE NATIONAL LABOR RELATIONS ACT.

The Board has consistently held that undocumented aliens are "employees" within the meaning of Section 2(3) of the Act[30] and that they are thus entitled to the protection of the Act.[31] The Board's interpretation is entitled to deference. In *NLRB v. Hearst Publications*, 322 U.S. 111, 130 (1944), the Court stated that the "task" of defining the term "employee," "has been assigned primarily to the agency created by Congress to administer the Act," and emphasized the Board's expertise in this area.

The theme of deference to the Board in interpreting and applying the Act sounds in numerous opinions of this Court.[32] The Court has stated that it will generally defer to the Board's defensible construction of the Act.[33] Only if the Board's decision regarding the meaning of the Act is unsupported by "substantial evidence on the record considered as a

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[30]*NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (1978), involved the Board's effort to obtain enforcement of its Order requiring Sure-Tan to negotiate with the Union. In that appeal, Sure-Tan argued that the bargaining Order was improper because six of the seven eligible voters were undocumented aliens who had since left the country. *Id.* at 358. The Court of Appeals rejected this argument, holding that undocumented aliens "are employees under the Act, and therefore are fully eligible voters." *Id.* at 359. Sure-Tan did not seek review by this Court of that decision.

[31]*See Amay's Bakery & Noddle Co.*, 227 NLRB 214 (1976) (undocumented aliens discharged in violation of the Act entitled to reinstatement with backpay); *Apollo Tire Co.*, 236 NLRB 1627 (1978), *enfd. NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979); *Sure-Tan, Inc. and Surak Leather Co.*, 231 NLRB 138 (1977), *enfd.* 583 F.2d 355 (7th Cir. 1978); *Duke City Lumber Company, Inc.*, 251 NLRB 53 (1980); *Viracon, Inc.*, 256 NLRB 245 (1981).

[32]In *Beth/Israel Hospital v. NLRB*, 437 U.S. 483, 500-501 (1978), for example, the Court noted that, "It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy." *See also, NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

[33]*NLRB v. Local 103, Int'l Ass'n of Ironworkers*, 434 U.S. 335, 350 (1978).

whole'' or is inconsistent with the fundamental policies of the Act, will the Court refuse to follow the Board's interpretation.[34]

In *NLRB v. Hearst Publications*, *supra*, the Court emphasized the breadth and flexibility of the Act's definition. The statute as a whole, from which the term ''employee'' ''takes color,'' ''must be read in the light of the mischief to be corrected and the end to be attained.'' *Id.* at 124. Congress designed the National Labor Relations Act to promote industrial peace by establishing a system of collective bargaining and to reduce the disparity in bargaining power between employers and employees. S. Rep. No. 573, 74th Cong., 1st Sess. 1-3 (1935). These underlying policies amply support the Board's decision that undocumented alien workers must be included within the purview of the Act.

Significant numbers of undocumented aliens work on a permanent or semi-permanent basis alongside American workers in the same or competing places of business.

> ''Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants -- numbering in the millions -- within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor. . . .'' *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2395-96 (1982).

Although this Court has referred to an Attorney General estimate of between 3 and 6 million,[35] more recent Census Bureau analysis suggests that the number is substantially lower — possibly as low as 2 million, of whom approxi-

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[34]*See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965); and *NLRB v. Brown*, 380 U.S. 278, 291 (1965).

[35]*Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2395 n.17 (1982).

mately 900,000 were born in Mexico.[36]

Undocumented aliens labor increasingly in industries which are the focus of efforts to promote collective bargaining. The undocumented alien work force is no longer primarily concentrated in agriculture, a sector of the economy explicitly exempted from the coverage of Section 2(3) of the Act.[37] Undocumented workers have entered the urban, industrial workforce, working beside workers whose ability to bargain collectively has been the traditional concern of the Act and the Board.[38]

Unless undocumented aliens are eligible to vote as "employees" in labor elections, an employer could easily frustrate the union certification process, as Sure-Tan sought to do here. If employees attempt to unionize and a union wins a certification election, the employer could seek to have the election results decertified on the ground that a critical number of "for-union" votes were cast by undocumented workers.[39] Not only would this ability to obtain decertification provide an incentive for the employer to hire undocumented aliens in order to secure a docile foreign labor force, it would have the further effect of depriving the employer's other employees of their own rights under the statute.

Exclusion of undocumented aliens from the Act thus jeopardizes the rights of all workers to bargain effectively. It would make the undocumented alien more attractive to many

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[36]Jeffrey S. Passel and Robert Warren, "Estimates of Illegal Aliens from Mexico Counted in the 1980 United States Census" (1983, Population Division, U.S. Bureau of the Census).

[37]Wayne A. Cornelius, Leo R. Chavez, Jorge G. Castro, *Mexican Immigrants and Southern California: A Summary of Current Knowledge* (1982).

[38]Although the number of undocumented aliens working in industry has increased, the evidence does not support the commonly held view that undocumented aliens take jobs away from citizens and legally admitted workers. *See generally* Wayne Cornelius, *Mexican Migration to the United States: Causes, Consequences and U.S. Responses* 52-71 (1983).

[39]*See, e.g., NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 360 (7th Cir. 1978).

employers than legally resident workers.[40] The true beneficiary of the recognition that coverage of the Act extends to undocumented aliens is the collective bargaining system itself. "[T]he lasting benefit [of allowing aliens to vote in labor elections] goes not to the law violators — the aliens — but rather to the Union, which is not accused of wrongdoing." *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 360 (7th Cir. 1978).

II.

SURE-TAN COMMITTED AN UNFAIR LABOR PRACTICE UNDER SECTIONS 8(a)(1) and (3) OF THE ACT BY REPORTING ITS UNDOCUMENTED ALIEN EMPLOYEES TO THE IMMIGRATION AND NATURALIZATION SERVICE IN RETALIATION FOR THEIR UNION ACTIVITY.

A. Sure-Tan Constructively Discharged Its Undocumented Alien Employees.

The Board's determination that an action constitutes an unfair labor practice is subject to only limited judicial review: "[I]n light of the Board's special competence in applying the general provisions of the Act to the complexities of industrial life, its interpretations of the Act are entitled to deference. . . ." *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S.Ct. 2161, 2170, 76 L.Ed.2d 277 (1983).

> "[I]n the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act . . . . Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953); *NLRB v. J. Weingarten*, 420 U.S. 251, 266-267 (1975).

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[40] *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1183 (9th Cir. 1979); *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 360 (7th Cir. 1978).

The Court of Appeals applied the two-part test for constructive discharge formulated in *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 358 (5th Cir. 1981) (*en banc*):

> "First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted to encourage or discourage membership in any labor organization within the meaning of Section 8(a)(3) of the Act."

Petitioners do not dispute that the anti-union animus element of this test was fully proved. Instead, they argue that the mandatory departure of their employees from the United States was not the proximate result of the employers' actions.

The Board's finding, however, was supported by testimony by an INS representative that the INS visited the Sure-Tan facility as a "direct result" of the letter from Sure-Tan. This evidence was undisputed by the employer and amply supports the Administrative Law Judge's conclusion that "but for [Sure-Tan's] letter to Immigration, the discriminatees would have continued to work indefinitely for [Sure-Tan]." *Sure-Tan, Inc.*, 234 NLRB at 1191 (1978).

The constructive discharge doctrine was created precisely to deal with situations where a direct termination by the employer cannot be shown, but where the employer sets in motion the "intolerable" circumstances which eventually result in the departure of the employees. The actions of Sure-Tan are just the sort of creative "circumvention" of the purposes of the Act which the Board is empowered to prevent.

The Board's conclusion that Sure-Tan's report to the INS was a violation of the Act is consistent with the usual criteria by which the Board defines such violations and is not inconsistent with the policies underlying the immigration laws. As the Board and the Court of Appeals have stressed, it is the context of Petitioners' request to the INS that makes the report an unfair labor practice: "It should be emphasized

. . . that the finding herein *does not* foreclose an employer from making a similar request where its request is not motivated by their employees' union activities or protected concerted activities." *Sure-Tan, Inc., supra*, 234 NLRB at 1191 n.5.

The Board and the Court of Appeals have not said or suggested that it is an unfair labor practice to enforce the immigration laws. They have merely said that it is impermissible selectively to call in the INS for the purpose of thwarting the collective bargaining process. This result is fully consistent with the immigration laws. Indeed, as the Court of Appeals observed,

> "[A] contrary holding would encourage employers to hire illegal aliens, who would for all practical purposes by stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy." *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 601 (7th Cir. 1982)

The timing of an employer's action may properly be considered to determine whether an unfair labor practice has occurred. Sure-Tan was aware of the undocumented status of its employees long before the election. In fact, numerous threats were made to report pro-union employees to the INS.[41] Sure-Tan's practice of employing undocumented aliens remained unchanged, however, up to the moment of union victory. Only then did Sure-Tan write the INS. Such a sudden change in policy after a union victory in an election is considered "an important factor in determining the validity of an inference of discrimination."[42] Sure-Tan argues

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[41]Such threats in themselves have consistently been regarded as unfair labor practices. *See e.g., George Glickley*, 175 NLRB 1084 (1969); *Viracon, Inc.*, 256 NLRB 245, 246 (1981).

[42]*See e.g., NLRB v. Montgomery Ward & Co., Inc.*, 554 F.2d 996, 1000-02 (10th Cir. 1977); *NLRB v. Treasure Lake, Inc.*, 453 F.2d 202 (3d Cir. 1971); *NLRB v. Master Slack*, 618 F.2d 6 (6th Cir. 1980).

Evidence of contemporary unfair labor practices, such as were found in the instant case, is also relevant to establishing an anti-union motive for a challenged action. *See e.g., NLRB v. Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (7th Cir. 1971). Sure-Tan's request to the INS was preceded by other unfair labor practices, including threats to employees and improper interrogation.

that it was only being civic-minded[43] when it called in the INS, but has totally failed to explain why it chose not to report its workers to the INS until *after* the union election.

Sure-Tan also argues that its actions were not the proximate cause of the discriminatees' departure from the United States because they elected voluntary departure after their arrest by the INS agents. This argument misapplies common notions of proximate causation. Sure-Tan's conduct clearly caused the arrest of the discriminatees by the INS. At that point, the discriminatees had the "option" of remaining in custody and undergoing a deportation proceeding, or of signing INS Form I-274 stating they agreed to leave the United States by a specified date. *See* 8 U.S.C. § 1252(b); 8 C.F.R. § 242.5.

Sure-Tan's letter to the INS was therefore the direct cause of the discriminatee's losing their jobs.[44] Moreover, since the loss of employment was clearly a foreseeable and intended result of Sure-Tan's letter, Sure-Tan's action should be considered the proximate cause of the discriminatees' having lost their jobs.[45]

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[43]Sure-Tan is incorrect in suggesting that it was under a legal duty to report its workers to the INS. No federal statute puts an affirmative duty on an employer to investigate or disclose the immigration status of his workers. While Congress now is considering legislation which would make it unlawful knowingly to hire an undocumented alien, this Court should not recognize a legal duty which Congress has not yet and may not impose. *See* S. 592, 98th Cong., lst Sess. (1983); H.R. 1510, 98th Cong., lst Sess. (1983). Moreover, even if Congress enacted a law prohibiting the employment of undocumented aliens, such a law would not necessarily immunize an employer who complies with the law in a discriminatory fashion -- knowingly hiring undocumented workers and then reporting them to the INS because of their union activity.

[44]As the leading treatise on the law of torts states: "If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." Prosser, *Law of Torts*, § 41, p.240 (4th ed. 1971).

[45]See generally Prosser, *Law of Torts*, §§ 43 & 44 at pp. 250-288 (4th ed. 1971). As there stated: "Obviously the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which he has subjected the plaintiff has indeed come to pass." *Id.*, § 44 at p. 273.

B. Neither the Immigration Laws nor the Constitution Immunize Sure-Tan's Illegal Discrimination.

Sure-Tan's argument that it cannot be an unfair labor practice to report an undocumented alien to the INS should be rejected. It is well established that if the reason asserted by an employer for a discharge is pretextual, the fact that the action taken is otherwise laudable or legal is not controlling. Even evidence of a "good-faith motive" for the discriminatory action "has not been deemed an absolute defense to an unfair labor practice charge." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230 n.8 (1963).

Analogous to the present case are cases involving underage employees. Employers in businesses such as liquor sales or heavy machinery, which require employees above a certain minimum age, have often discharged pro-union underage employees in the midst of union organizing campaigns. In response to charges of discriminatory termination, these employers have argued that the discharge was in each case mandated by local, state, or federal minimum-age laws. The Board has consistently rejected this defense where the employer knew of the age problem and would not have discharged the employee but for his union activity:

> "The existence of a legitimate reason to discharge an employee is no defense to an alleged unlawful discharge where that legitimate reason is not a moving cause of the discharge. If the reason asserted by an employer for a discharge is a pretext, then the nature of the pretext is immaterial. That is true even where the pretext involves a reliance on state or local laws."[46]

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[46] *New Foodland, Inc.*, 205 NLRB 418, 420 (1973). *See also The Embers of Jacksonville, Inc.*, 157 NLRB 622, 631 (1966), *enfd.* 64 LRRM 2681 (5th Cir. 1967) (busboys known to the employer to be legally under-age discharged only after union organizing began); *Justrite Manufacturing Co.*, 238 NLRB 57, 65-66 (1978) (employer aware machine operator under minimum age long prior to discharge, ostensibly for age, after refusal to sign anti-union petition).

Petitioners also argue that, under *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983), their report to the INS is immunized from a finding of an unfair labor practice because it was an exercise of their "First Amendment right to petition the government."

Bill Johnson's is distinguishable from the present case on several grounds. In *Bill Johnson's*, a waitress filed charges with the Board alleging she had been fired because of her efforts to organize a union. She and other employees then picketed the restaurant and leafletted customers. The owners of the restaurant filed suit in state court against the demonstrators, charging they had harassed customers, blocked access and libelled the plaintiffs. The Board found that the filing of this lawsuit constituted an unfair labor practice. The Court of Appeals affirmed. This Court reversed.

The Court in *Bill Johnson's* emphasized that the customary deference shown the decisions of the Board was overcome for two reasons. First, depriving the employer of the right to pursue an action in court would leave him no forum in which to pursue a remedy for an "actual injury." 103 S.Ct. at 2169-2170. The Court repeatedly noted that the employer alleged that he suffered harm at the hands of the former employees. The right to petition is the right to go "to a judicial body for redress of alleged wrongs." *Id.* at 2169. The Court cited numerous decisions establishing the principle that an employer has the right to seek judicial protection from tortious conduct in a labor dispute. *Id.* at 2169.

The reasoning of *Bill Johnson's* does not apply to Sure-Tan. Sure-Tan cannot and does not claim that it suffered wrongs at the hands of its undocumented alien employees. It did not petition the INS for "redress of grievances." Sure-Tan suffered no actual injury which it sought to redress by writing the INS. It knowingly employed undocumented aliens and no federal or state law to which it was subject penalized it for continuing to retain its undocumented workers.

The Court in *Bill Johnson's* also emphasized the principles of federalism which underlay its decision that resort

to a state court should not be an unfair labor practice: "[I]n recognition of the States' compelling interest in the maintenance of domestic peace, the Court has construed the Act as not preempting the States from providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.' " *Id.* at 2169. Sure-Tan's request, in contrast, went to a federal agency. No consideration of federalism or compelling state interest is involved.[47]

III.

THE BOARD SHOULD HAVE THE DISCRETION TO TAILOR THE CONVENTIONAL REMEDIES OF REINSTATEMENT AND BACKPAY TO THE UNIQUE REMEDIAL PROBLEMS RAISED BY THIS CASE.

Under Section 10(c) of the Act, the Board has the responsibility of devising remedies to effectuate the policies of the Act. This Court has repeatedly recognized that the Board has broad discretion to fashion remedies subject to limited judicial review. *See, e.g., Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

The Board's power to fashion backpay and reinstatement awards in particular is "a broad discretionary one. . . ."

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[47]Sure-Tan's reliance on two cases interpreting the antitrust laws is similarly misplaced. Sure-Tan's letter to the INS cannot be equated with the political campaign mounted by the railroad companies in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), to influence the election process. In any event, the *Eastern Railroad* decision is an interpretation of the Sherman Act. While the constitutional right to petition is discussed, it is only to note that the court will not "lightly impute to Congress" the "intent to invade these freedoms." *Id.* at 138.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), is also inapposite. To begin with, the Court held in that case that even First Amendment rights to petition for redress of grievances are subject to regulation under the antitrust laws, "when they are used as an integral part of conduct which violates a valid statute." *Id.* at 514. The Court's statement that it is not a violation of the antitrust laws for groups with common interests to utilize the procedures of state and federal agencies and courts, "to advocate their causes and points of view respecting resolution of their business and economic interests *vis a vis* their competitors," *id.* at 511, has no bearing here. There was no dispute between competitors, and no actual injury to Sure-Tan which prompted it to petition the government to correct a grievance.

Such power:

> "is for the Board to wield, not for the courts. . . . When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of backpay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 346-47 (1953).

The more detailed and particularized the issue, the greater deference is due the Board. Discussing the Board's formula for computation of backpay, this Court has stated:

> "It is not for us to weigh these or countervailing considerations. Nor should we require the Board to make a quantitative appraisal of the relevant factors . . . As is true of many comparable judgments by those who are steeped in the actual workings of these specialized matters, the Board's conclusion may 'express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . .,' and they are none the worse for it . . . '[t]he Board was created for the purpose of using its judgment and its knowledge.' " *Id.* at 348.

This Court has also recognized that the normal policy of the Board is to fashion first a general remedy and then to modify that remedy in compliance proceedings to suit individual cases. *NLRB v. J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 260 (1969).[48]

The Board's expertise and long experience in handling factual issues of backpay and reinstatement awards in compliance proceedings is evidenced by the detailed procedures and policies set forth in the Board's *Casehandling Manual*.[49] The Board has standard procedures for dealing with missing

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[48] *See also Trico Products Corp. v. NLRB*, 489 F.2d 347, 353-54 (2d Cir. 1973) ("[c]ompliance proceedings will be necessary to determine the amount of backpay . . .").

[49] See Part III, §§ 10584.2-3, 10612-622, 10644.

discriminatees, for determining whether or not the discriminatee should be considered unavailable for work, and for handling the problem of long delays in locating the discriminatee. Under the conventional practices of the Board, the employer is protected from injustice by the ability to introduce evidence in the compliance proceeding tending to show that in individual cases, the general award of the Board should be modified.[50]

A. Reinstatement Conditioned on Legal Reentry to the United States.

The Board ordered Sure-Tan to offer the discriminatees unconditional reinstatement, indicating that the Order would be implemented in detail in the compliance proceeding.[51] The Court of Appeals modified this Order to "require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement."[52] While the Court of Appeals' Order departs from conventional practice by modifying the conventional remedy of reinstatement prior to the compliance proceeding, there is ample Board precedent for conditioning remedies on the satisfaction of certain conditions.[53]

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[50]*NLRB v. Robert Haws Company*, 403 F.2d 979, 981 (6th Cir. 1968); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966).

The employer may show that the discriminatee is not entitled to backpay, for example, because he has left the labor market or has refused to accept alternative work. *See NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307, 1316-18 (D.C. Cir. 1972). Backpay awards may also be reduced where the employer can prove that the discharge would have occurred shortly after the discriminatory discharge because of financial difficulties or the insolvency of the business. *See, e.g., Trico Products Corp. v. NLRB*, 489 F.2d 347, 353-54 (2d Cir. 1973).

[51]*Sure-Tan, Inc.*, 246 NLRB 788 (1979).

[52]*NLRB v. Sure-Tan, Inc., supra*, 672 F.2d at 606.

[53]In *Justrite Manufacturing Co.*, 238 NLRB 57 (1978), the employer committed an unfair labor practice by firing an under-age employee because of her union activity. The Board ordered that the employee should be offered full reinstatement. Since the employee had reached her eighteenth birthday at the time the Board ruled, her reinstatement was to be immediate. Yet seniority was to commence effective only on the date of the discriminatee's birthday. *Id.* at 68. *See also, New Foodland, Inc.*, 205 NLRB 418 (1973); *The Embers of Jacksonville, Inc., supra*, 157 NLRB 627 (1966), *enfd.*, 64 LRRM 2681 (5th Cir. 1967).

An offer of reinstatement conditioned on legal reentry to the United States would not, of course, encourage illegal entry, but should operate as an incentive *against* illegal reentry. Such an offer thus disposes of the potential conflict with the immigration laws that exists if unconditional reinstatement is offered.[54]

B. The Reinstatement Offer Should Be Kept Open for Sufficient Time to Provide the Discriminatee With a Reasonable Opportunity to Gain Legal Entry.

The Board generally requires that each victim of discrimination should be given "adequate time" to accept an offer of reinstatement in view of the particular factual circum-

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[54]As a practical matter, it is doubtful that an offer of reinstatement conditioned on legal reentry would in fact alter the already great incentives for Mexican workers to enter this country illegally. As this Court has recognized, legal benefits provided in the United States are of no consequence as a spur to immigration. *Plyler v. Doe*, *supra*, 102 S.Ct. at 2401. Ample incentive exists for undocumented immigration regardless of any specific job offer. The overriding motivation, according to authoritative studies, is simply "to get a job." David S. North and Marion F. Houston, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study* (1976). The undocumented alien worker is attracted to the United States labor market because the market offers better wages and working conditions than can be obtained in the country of origin. Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest, Final Report*, 31-36 (1981); Alejandro Portes, "Undocumented Immigration and the International System: Lessons from Recent Legal-Mexican Immigrants to the United States," in Rios-Bustamante, Antonio (ed.) *Mexican Immigrant Workers in the United States*, 74 (1981). Most relevant to the Sure-Tan situation, a leading study has determined that the Chicago area in particular was the "most preferred" site for obtaining jobs because of high pay scales. Wayne A. Cornelius, *Mexican Migration to the United States: Causes, Consequences, and U.S. Responses* 21 (1978).

There is also evidence that even without an offer of reinstatement outstanding, deported undocumented alien workers return to the United States, often even to the same employers, shortly after they have been compelled to leave the country. One 1981 study based on INS and Social Security Administration data indicated that more than half of the undocumented aliens apprehended in 1975 had returned to the United States labor force by 1980, once again without the required documentation. David S. North, *Government Records: What They Tell Us About The Role Of Illegal Immigrants In The Labor Market And In Income Transfer Programs* 39-46 (1981).

stances of each case.[55] "An important element to be considered in determining the validity of an offer of reinstatement is whether it affords the offeree a reasonable period of time to consider it." *NLRB v. Murray Products, Inc.*, 584 F.2d 934, 940 (9th Cir. 1978). The period of time designated as "reasonable," "depends on the situation in which the offeree finds himself as a result of the discrimination against him." *Id.*

The flexible nature of the "reasonableness" requirement, dependent as it is on the particular circumstances of each case, make irrelevant Petitioners' recitation of past cases finding short time periods to be "reasonable." Petitioner's Brief, 29-30. The Board should have the discretion to decide that in the situation of an undocumented alien constructively discharged by his employer, a reasonable period of time is that required for the discriminatee to secure permission from the United States government to reenter the country legally or to exhaust avenues of obtaining such permission. The available evidence suggests that the four-year period adopted by the Seventh Circuit is the bare minimum if the discriminatee is to have a realistic opportunity to accept the offer, since it may well take that long or more for those discriminatees eligible to gain legal entry to do so.[56] Absent such an opportunity, the offer of reinstatement would be illusory.

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[55]3 NLRB Casehandling Manual 10528.14 (1977); *Miami Coca-Cola Bottling Company*, 151 NLRB 1701, 1706-07, n.4 (1965), *enfd. in relevant part*, 360 F.2d 569 (1966).

[56]The undocumented alien who is deported or voluntarily departs this country must apply for permission to reenter the United States legally through the office of the United States consul in the country of his origin. An undocumented alien resident in the United States must go through the same process to acquire a visa for permanent residence. The time required for both categories of the undocumented to obtain the proper visa or to exhaust the process is the same. The acceptance of voluntary departure, as in the instant case, does not prejudice the consideration of the visa application.

Recent United States Department of State information regarding visas indicates that applications by Mexican nationals seeking visas to work in the United States are generally backlogged between five and nine years. U.S. Department of State, Visa Office, "Bulletin," May 13, 1983, in American Council for Nationalities Service, *Interpreter Re-*

C. The Board Should Have Discretion to Impose a Minimum Amount of Backpay Even if the Discriminatee Is Absent From the Labor Market Due to the Unfair Labor Practice.

A backpay award is generally remedial in nature and serves to restore the discriminatee to the economic position he would have enjoyed but for the discrimination.[57] Yet the Board and the courts should consider that the purpose of such a "make whole" order is not so much to achieve "private reimbursement" but the "vindication of the public policy" which the Board enforces.[58] The backpay order may not be used in a "purely punitive manner," but a backpay order is to be utilized "in aid of the Board's authority to deter unfair labor practices."[59] As this Court has stated, a backpay order:

> "somewhat resemble[s] compensation for private injury, but it must be constantly remembered that [it is a] remedy created by statute . . . designed to aid in achieving the elimination of industrial conflict. [It] vindicate[s] public, not private rights." *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 553, 543 (1943).

While there must be a "remedial" purpose in the backpay award, the Board does have broad discretionary power so long as the award effectuates the purposes of the Act: In solving the problems which arise in backpay cases, the

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leases, Vol. 60, no. 18, May 12, 1983. The only aliens with waiting times less than five years are those who qualify as "Members of the professions or persons with exceptional ability in the sciences or arts, who have job offers in the U.S., provided that a shortage of U.S. workers exists" (third preference), and those who qualify as "Skilled or Unskilled Workers in occupations in which there is a shortage of U.S. workers," and have a job offer at the prevailing wage rate (sixth preference). These two categories constitute only 20% of the available visas. *Id.*

[57] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941).

[58] *NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C.Cir. 1972).

[59] *NLRB v. United Marine Division*, 417 F.2d 865, 868 (2d Cir. 1969), *cert. denied*, 397 U.S. 1008 (1970).

Board is vested with "the discretionary power to mould remedies suited to practical needs." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 351-52 (1953). The "make whole" standard is not the only measure of damages permissible under the broad rubric of "remedial" purpose. The Board and the courts have recognized that there is an "alternative requirement of a remedial measure: the depriving of respondent of an advantage gained in violation of the Act." *NLRB v. Coats & Clark, Inc.*, 241 F.2d 556, 562 (5th Cir. 1957).

The fact that the discriminatees were aliens who were not legally entitled to remain in the United States and have since left the United States should not deprive the discriminatees of the right to receive monetary compensation for the employer's unfair labor practice. Contrary to Petitioners' arguments, undocumented aliens are in fact eligible for various federal and state benefits, including benefits designed to compensate for injuries and benefits under some "pay-in" social welfare programs to which the undocumented alien employee has made contributions.[60]

In ordinary circumstances, the Board treats periods absent from the country as time unavailable for work and backpay is tolled accordingly.[61] In the present case, however, the employer's unfair labor practice proximately caused the departure from the United States of the undocumented aliens. Neither the deterrent nor the make-whole purposes of the

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[60]Undocumented workers can recover back wages and obtain injunctive relief under the Fair Labor Standards Act, which sets minimum wage and maximum hour standards. 29 U.S.C. §§ 201-219; *Gates v. Rivers Constr. Co.*, 515 P.2d 1020 (Alaska 1973); *Brennan v. El San Trading Corp.*, 73 Lab. Cas. 46,361 (1973). In some states, including Illinois, they are eligible for workers' compensation benefits. Ill. Ann. Stat. ch. 48; Cal. Lab. Code § 3600. Other programs for which undocumented aliens can qualify under certain circumstances include Social Security Disability, Retirement and Survivor's Benefits; Supplemental Security Income; and Maternal and Child Health and Crippled Children's Services. 42 U.S.C. § 402(n); 42 U.S.C. § 1382c(a)(1)(B); 20 C.F.R. § 416.202 & 416.203; 42 U.S.C §§ 701 *et seq.*

[61]3 NLRB Casehandling Manual § 10612 (1977).

remedial provisions of the Act will be satisfied if backpay liability is tolled from the instant the discriminatees departed the United States. Absent some backpay award, the employer will escape all monetary liability for its deliberate retaliation against its employees because of their union activity.

Backpay should not be tolled where the unavailability of the employee for work is a direct result of the employer's unfair labor practice. In *Moss Planning Mill Co.*[62] for example, an employer injured a worker, disabling him temporarily, in the course of committing an unfair labor practice. The Board rejected the argument that the backpay award should be tolled because the injury made the employee unavailable for work: "[A]s [the employee's] incapacity to work . . . following his discharge was caused by the injury inflicted upon him by the [employer], we shall not abate backpay for such period."[63]

The Board has codified this rule in its *Casehandling Manual*, which provides that "injuries resulting from unfair labor practices may not toll backpay."[64] The same rationale should apply where, as here, the employer's unfair labor practice has directly forced the employee to leave the United States and be unavailable for work.

For the same reason, the employer's offer of reinstatement should not terminate the period for which backpay is payable since the discriminatees were unable immediately to accept the offer of reinstatement because of the employer's unfair labor practice. As this Court has had occasion recently to observe, the general rule[65] that a reinstatement offer terminates the period for which backpay is owed has its origin in the ancient principle of law that:

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[62]103 NLRB 414 (1953), *enfd.*, 206 F.2d 557 (4th Cir. 1953).
[63]*Id.* at 419.
[64]3 NLRB Casehandling Manual § 10612.1 (1977).
[65]*Id.* § 10530.1(1) (1977).

> "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." *Ford Motor Co. v. Equal Employment Opportunity Commission*, ___ U.S. ___ n.15, 73 L.Ed.2d 721, 732 n.15, 102 S.Ct. 3057, 3065 n.15 (1982), quoting C. McCormick, Handbook on the Law of Damages 127 (1935).

Thus, the general rule that refusal of a reinstatement offer ends liability for backpay rests on the belief that the injured worker should not be paid for losses "which he wilfully incurred." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-198 (1941); *Ford Motor Co. v. Equal Employment Opportunity Commission, supra.*

Applying this analysis here, the discriminatees should not be barred from recovering backpay simply because they were unable immediately to accept the employers' reinstatement offer. The employees could not have avoided the damage because they were unable to accept the reinstatement offer precisely because of the nature of the employers' unfair labor practice. The discriminatees did not "wilfully incur" any portion of their loss.

Allowing the Board to set a minimum period of backpay would not require the Board to engage in improper speculation. The Board has traditionally had the discretion to evaluate "what might have been" absent an unfair labor practice in order to fashion a remedy. *NLRB v. Superior Roofing Company*, 460 F.2d 1240, 1241 (9th Cir. 1972).

The Seventh Circuit determined here that an appropriate backpay period was six months, reasoning that, but for the employer's unfair labor practice, the discriminatees would have continued to work in the United States for that period. Contrary to the assertions of Petitioners, the six-months estimate is not unreasonable. Studies of undocumented aliens

apprehended by the INS show that the majority have worked in the United States at least seven months prior to apprehension. INS statistics show that between 1976 and 1980, between 47.3 percent and 61.9 percent of undocumented aliens discovered by the INS Investigations Division have been in the United States more than seven months.[66] An earlier study indicated that the average time spent in the United States by apprehended undocumented aliens was 2.5 years and the median was over 4 years.[67]

Thus, there is every reason to conclude that the discriminatees in this case would have been able to remain in the United States at least six more months but for the employer's unfair labor practice.

D. The Employer Should Be Required to Communicate With the Discriminatees in Both English and Spanish.

There is ample precedent for requiring that a notice related to an employer's unfair labor practice be posted both in English and in Spanish or another appropriate second language.[68] While prior cases have involved posted notices rather than reinstatement offers, there is no justification for requiring posted notices to be bilingual but allowing reinstatement offers to be written in English alone.

Petitioners' reliance on *General Iron Corp.*, 218 NLRB 770 (1975), is misplaced. In *General Iron Corp.*, the Board

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[66]David S. North, *Government Records: What They Tell Us About the Role of Illegal Immigrants in the Labor Market and in Income Transfer Programs* 21 (1981).

[67]David S. North and Marion F. Houston, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study* (1976).

[68]*See, e.g., Apollo Tire Co., Inc.*, 236 NLRB 1627, n.3 (1978), *enfd.*, 604 F.2d 1180 (9th Cir. 1979); *Viracon, Inc.*, 256 NLRB 245 (1981); *John F. Cuneo*, 152 NLRB 929 (1965). The Board has also mandated the use of bilingual ballots in union representation elections where requested. *See, e.g., NLRB v. Lowell Corrugated Container Corp.*, 431 F.2d 1196 (1st Cir. 1970); *General Dynamics Corp.*, 187 NLRB 679 (1971).

held that a reinstatement offer written in English was satisfactory, despite the fact that all but one of the laid-off employees were Spanish speaking. This holding, which has been criticized by commentators as "logically indefensible," *see* Douglas S. McDowell and Kenneth C. Huhn, NLRB Remedies for Unfair Labor Practices 111 (1976), is in any event distinguishable. In *General Iron Corp.*, the Board appeared to reason that those who cannot speak English may yet read it and that a person who cannot read a letter may be able to show it to "a member of the family, often a child who is attending public school, a friend, or neighbor. . . . People do not just ignore or throw away letters written in English, especially where, as here, they come from an employer who has just laid them off." 218 NLRB at 771. That rationale, however, is not applicable to aliens who find themselves returned to their native land, surrounded by others who cannot read English.[69]

CONCLUSION.

For the foregoing reasons, *amici curiae* respectfully request that this Honorable Court affirm the judgment of the Court of Appeals.

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[69]Many aliens come from rural areas or small villages in the central plateau of Mexico. W.A. Cornelis, L.R. Chavez, and J.G. Castro, *Mexican Immigrants and Southern California: A Summary of Current Knowledge* 17-20 (1982).

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